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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 538

CLINTON WATCH CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–21) [1] is reported at 291 F. 2d 838. The opinions and orders of the Federal Trade Commission (Br. App. 79–89, 128–131) have not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1961, and a motion for rehearing was denied on July 18, 1961 (Pet. 2). The final decree of the court, enforcing the Commission's order, was

[1] "Pet. App." refers to the appendices to the petition. "Br. App." refers to the "Appendix to Brief of Petitioners" in the court of appeals.

entered on September 20, 1961 (Pet. App. 22–24). On September 25, 1961, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to November 16, 1961. The petition was filed on November 9, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission abused its discretion by refusing to stay the effective date of a cease-and-desist order against the corporate petitioner until the completion of proceedings against its competitors.

2. Whether the Commission abused its discretion by designating certain individual petitioners in the order by name rather than by corporate title.

STATEMENT

The Federal Trade Commission issued a complaint against petitioner Clinton Watch Co. ("Clinton") and against petitioners Irving L. Wein, Bernard J. Cogan and Max Magnus, individually and as officers of Clinton, charging them with unfair and deceptive acts and practices and unfair methods of competition, in violation of the Federal Trade Commission Act (Br. App. 9–13). After full administrative proceedings, the Commission found that Clinton had preticketed its watches at fictitious, excessive prices and had falsely represented the guaranty thereof; that Wein, the president of Clinton, had formulated, directed and controlled its policies; and that Magnus and Cogan, the vice president and

secretary of the company, respectively, had no responsibility for, and had not personally participated in, the violations (Br. App. 82–83). The Commission issued a cease-and-desist order, which ran against Clinton, against Wein individually and as an officer of Clinton, and against Magnus and Cogan solely as officers of Clinton (*ibid.*). The Court of Appeals for the Seventh Circuit unanimously affirmed (Pet. App. 17–21).

Petitioners requested the Commission to stay the effective date of the order until pending Commission proceedings involving similar charges against Clinton's competitors had been completed. They urged that otherwise they "would sustain heavy financial loss, and would possibly be eliminated from competition by termination of their enterprise," since "their larger and allegedly more culpable competitors against whom Commission proceedings are presently pending may persist in these [deceptive] practices" (Pet. App. 20). The Commission denied the request, stating that these considerations were "far outweigh[ed]" by the "public interest" in terminating the deceptive practices (Br. App. 130). The court of appeals sustained this ruling. It held that "[t]he circumstances of this case do not warrant resort to the court's equitable powers or interference with the Commission's exercise of its wide discretion in the choice of remedy deemed adequate to cope with deceptive trade practices," since "[p]etitioners have failed to show that there has been a patent abuse of discretion by the Commission" in refusing to postpone the effective date of its order (Pet. App. 20–21).

The court also rejected the contention that the Commission had improperly designated Magnus and Cogan in the order by name rather than by corporate title.[2] It stated (Pet. App. 21):

> The Commission has authority to bind Cogan and Magnus in their capacities as corporate officials through whom Clinton Watch Company must operate in the transaction of its practices. This court will not substitute its wisdom for that of the Commission in respect to the practice of naming these officers specifically rather than referring to them by their corporate titles. * * *

ARGUMENT

The petition presents no substantial question warranting review by this Court. On the contrary, the primary issue raised by the petition has previously been resolved by this Court, and the other issue is insubstantial.

1. This Court, in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, held that "the decision as to whether or not an order against one firm to cease and desist * * * should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission" (355 U.S. at 413), and that the Commission's "discretionary determination [to make the order effective immediately] should not be overturned in the absence of a patent abuse of discretion" (p. 414). Petitioners claim that the Commission abused its discretion in making the order immediately

[2] The Commission's right to enjoin Wein by name, both individually and as an officer of Clinton, was not challenged.

effective, because such order will allegedly destroy Clinton's business if its competitors are free to continue their unfair trade practices. The same argument was rejected by this Court in *Federal Trade Commission* v. *C. E. Nichoff & Co.*, disposed of by the same opinion as the *Moog* case, *supra*. In *Nichoff*, the company "requested the Commission to hold in abeyance the cease and desist order that had been recommended by the hearing officer, on the ground that respondent would have to go out of business if compelled to sell at a uniform price while its competitors were not under similar restraint" (355 U.S. at 412). The Commission denied the request, the court of appeals postponed the effective date of the order, and this Court reversed. It held that the Commission's refusal to postpone the effective date, in the face of the claim that failure to do so would put the company out of business, was not such a "patent abuse of discretion" as to justify the reviewing court in overturning the agency's "discretionary determination" (p. 414).

Similarly, in the instant case the court of appeals correctly held that petitioners "have failed to show that there has been a patent abuse of discretion by the Commission" (Pet. App. 21) in making its order effective immediately. "It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law" (*Moog, supra*, at 413), and the Commission was justified in concluding that "the public interest [in terminating the deceptive prac-

tices immediately] far outweighs the private considerations urged by [petitioners]" (Br. App. 130).[3] Furthermore, in the present case, as the court of appeals pointed out (Pet. App. 20), there is no evidentiary basis in the record for petitioner's claim that enforcement of the order will force Clinton out of business.

2. It is settled that the Commission has authority to include officers and agents of an offending corporation in its cease-and-desist order. *Sebrone Co.* v. *Federal Trade Commission*, 135 F. 2d 676 (C.A. 7); *Mandel Bros., Inc.* v. *Federal Trade Commission*, 254 F. 2d 18, 22-23 (C.A. 7), reversed on the other grounds, 359 U.S. 385; cf. *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14. The determination of whether these officers and agents should be designated by their corporate titles or individually by name is a matter for the Commission's informed judgment. In view of the "wide discretion" that the Commission has in the "choice of a

[3] Petitioners' contention (Pet. 11-13) that the court of appeals erred in denying their motions to introduce additional evidence before the Commission as to the status of pending Commission proceedings against other watch companies, and to receive a Commission statement as to the progress of these hearings, is likewise without merit. For the Commission's determination, affirmed by the court of appeals, that the public interest in preventing Clinton at the earliest possible moment from further misleading the public outweighed any contrary considerations, was not based upon how nearly completed the other proceedings were, but upon the public interest in promptly terminating Clinton's illegal practices.

remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611), the court of appeals correctly declined to "substitute its wisdom for that of the Commission" (Pet. App. 21) where that agency deemed designation by name necessary for the "order to be fully effective" (Br. App. 131).

Petitioners argue that it is unfair to designate Magnus and Cogan by name, since they were found to have had no responsibility for the violations. The Commission's consistent practice, however, where corporate officers who have been charged in both their individual and corporate capacities are found not to have participated individually in the violations, is to designate them in the order by name in their corporate capacities.[1] A justification for the practice is that, when named officers are charged in both their corporate and individual capacities, an order that merely runs against the corporation and its "officers" (without giving their names) might be construed as not covering those officers listed by name in the complaint. Since the Commission expressly found that Magnus and Cogan had not personally participated in the violations, and since the order runs against them only in their corporate capacities, they were not prejudiced by the fact that the order specifically refers to them by name.

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[1] See, *e.g.*, *Kay Jewelry Stores*, 54 F.T.C. 548, 559; *Wilson Tobacco Board of Trade, Inc., et al.*, 53 F.T.C. 141, 190-191.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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